Supreme Court, U.S.
FILED
001156 JAN 17 2001
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

LEVI STRAUSS & COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

RONALD W. GERDES
GILBERT LEE SANDLER
EDWARD M. JOFFE
SANDLER, TRAVIS
& ROSENBERG, P.A.
1300 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 638-2230

CARTER G. PHILLIPS*
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

MARK E. HADDAD
PAUL J. WATFORD
SIDLEY & AUSTIN
555 West Fifth Street
40th Floor
Los Angeles, CA 90013
(213) 896-6000

Counsel for Petitioner

* Counsel of Record

January 17, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

SIPP

QUESTION PRESENTED

Whether 19 C.F.R. § 10.16(c) reasonably interprets the statutory phrase "operations incidental to the assembly process" in Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

The only parties to the proceeding are the petitioner and respondent as listed in the caption. Petitioner Levi Strauss & Company does not have a parent company, and no publicly held company owns 10% or more of petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	7
CONCLUSION	11

TABLE OF AUTHORITIES

CASES — Page

Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) 6

United States v. *Haggar Apparel Co.*, 526 U.S. 380 (1999) 6, 7, 9

United States v. *Levi Strauss & Co.*, 527 U.S. 1001 (1999) 6

United States v. *Mast Indus., Inc.*, 668 F.2d 501 (C.C.P.A. 1981) 5

STATUTES

19 U.S.C. § 1202, subheading 9802.00.80 ..... 2, 5, 6

28 U.S.C. § 1295(a)(5) 6, 10

§ 1581(a) 5

19 C.F.R. § 10.16(c) 2, 5, 7, 9

ADMINISTRATIVE RULINGS

Headquarters Ruling Letter, No. 559702, 1996 WL 612405 (Customs July 12, 1996) 9

Headquarters Ruling Letter, No. 560744, 1998 WL 731118 (Customs Apr. 28, 1998) 9

RULE

Sup. Ct. R. 12.4 8

IN THE

Supreme Court of the United States

No. 00-

LEVI STRAUSS & COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The July 27, 2000, opinion of the Court of Appeals for the Federal Circuit, following remand from this Court, is reported at 222 F.3d 1344. See Appendix ("App.") 1a-6a. The June 19, 1997, opinion of the Court of International Trade (App. 7a-20a) is reported at 969 F. Supp. 75. The September 22, 1998, opinion of the Federal Circuit (App. 21a-32a) is reported at 156 F.3d 1345.

JURISDICTION

Levi Strauss & Company's petition for rehearing was denied on October 19, 2000. App. 33a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202, provides that, with respect to:

> Articles . . . assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting[, the duty that is to be paid is to be calculated] upon the full value of the imported article, less the cost or value of such products of the United States . . . .

2. Subsections (b) and (c) of 19 C.F.R. § 10.16 provide as follows:

> (b) Operations incidental to the assembly process. Operations incidental to the assembly process whether performed before, during, or after assembly, do not constitute further fabrication, and shall not preclude the application of the exemption. The following are examples of operations which are incidental to the assembly process:
>
> (1) Cleaning;
>
> (2) Removal of rust, grease, paint, or other preservative coating;
>
> (3) Application of preservative paint or coating, including preservative metallic coating, lubricants, or protective encapsulation;
>
> (4) Trimming, filing, or cutting off of small

amounts of excess materials;

(5) Adjustments in the shape or form of a component to the extent required by the assembly being performed abroad;

(6) Cutting to length of wire, thread, tape, foil, and similar products exported in continuous length; separation by cutting of finished components, such as prestamped integrated circuit lead frames exported in multiple unit strips; and

(7) Final calibration, testing, marking, sorting, pressing, and folding of assembled articles.

(c) Operations not incidental to the assembly process. Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 U.S.C. § 1202):

(1) Melting of exported ingots and pouring of the metal into molds to produce cast metal parts;

(2) Cutting of garment parts according to pattern from exported material;

(3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics;

(4) Chemical treatment of components or assembled articles to impart new characteristics, such as

showerproofing, permapressing, sanforizing, dying or bleaching of textiles;

(5) Machining, polishing, burnishing, peening, plating (other than plating incidental to the assembly), embossing, pressing, stamping, extruding, drawing, annealing, tempering, case hardening, and any other operation, treatment or process which imparts significant new characteristics or qualities to the article affected.

STATEMENT OF THE CASE

1. Levi Strauss & Company designs, manufactures, and markets a wide variety of apparel products. The apparel products at issue in this case are cotton denim jeans for boys. The jeans were assembled in Guatemala from fabric that was manufactured and cut to shape in the United States. App. 8a. After assembly, the jeans were "stonewashed" at the assembly plant in Guatemala. *Id.* at 22a-23a.

Stonewashing refers to a process that manufacturers use to soften denim jeans and lighten their color, qualities which consumers find desirable. *Id.* at 22a. Ordinary washing of jeans causes them to soften and fade in color, but some manufacturers add stones to the wash in order to cause abrasion, which accelerates the softening and fading process. *Id.* The effects of stonewashing can also be achieved by adding an enzyme to the wash instead of stones, which is what Levi did with respect to the jeans at issue in this case.

2. Upon arrival in the United States, Levi's jeans were subject to customs duties. Ordinarily, a duty would be imposed on the full value of the imported goods. However, the tariff provisions enacted by Congress provide a partial duty exemption for certain goods that are assembled abroad but whose components were made in the United States. As relevant here, Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. § 1202, provides that the duty owed on such goods is to be

calculated based upon "the full value of the imported article, less the cost or value of [the components made in the United States]," if certain conditions are met. The condition at issue in this case requires that the American-made components sent abroad for assembly not have been "advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting." 19 U.S.C. § 1202, subheading 9802.00.80.

The Customs Service has promulgated a regulation interpreting the phrase "operations incidental to the assembly process" as used in Subheading 9802.00.80. See 19 C.F.R. § 10.16. As relevant here, that regulation provides: "Any significant process, operation, or treatment other than assembly whose primary purpose is the . . . physical or chemical improvement of a component . . . shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article." *Id.* § 10.16(c). The regulation then provides several examples of operations not deemed incidental to assembly, including the "[c]hemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles." *Id.* § 10.16(c)(4).

3. Levi sought a partial duty exemption for its enzyme-washed jeans under Subheading 9802.00.80 of the HTSUS. The Customs Service denied the exemption, on the ground that the enzyme-washing process constituted a "[c]hemical treatment" equivalent to the "bleaching of textiles" under 19 C.F.R. § 10.16(c)(4). App. 3a.

Levi filed an action challenging the denial of the partial duty exemption in the Court of International Trade, which has exclusive jurisdiction to review protests of classification determinations by the Customs Service. See 28 U.S.C. § 1581(a). Applying the multi-factor test established in *United States* v. *Mast Industries, Inc.*, 668 F.2d 501 (C.C.P.A. 1981), the court concluded that the enzyme-washing process

was incidental to assembly, and thus did not disqualify Levi's jeans from the partial duty exemption under Subheading 9802.00.80. App. 19a. The Court of International Trade did not consider the effect of 19 C.F.R. § 10.16(c) in reaching its conclusion. App. 4a. The Court did, however, consider the plain language of the statute, and concluded that the "enzyme-wash process is analogous to . . . painting," which Congress specifically identified as a process incidental to assembly. App. 19a; see 19 U.S.C. § 1202, subheading 9802.00.80.

4. The government appealed to the Federal Circuit, which has exclusive jurisdiction to review decisions of the Court of International Trade. See 28 U.S.C. § 1295(a)(5). The court of appeals agreed with the trial court's application of the *Mast* factors and affirmed. App. 21a-32a. Relying on recent Federal Circuit precedent, the court of appeals also rejected the government's argument that the Court of International Trade erred by not deferring to 19 C.F.R. § 10.16(c) as a reasonable interpretation of the tariff statutes, under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

5. This Court granted the government's petition for a writ of certiorari, vacated the Federal Circuit's judgment, and remanded for reconsideration in light of *United States* v. *Haggar Apparel Co.*, 526 U.S. 380 (1999). See *United States* v. *Levi Strauss & Co.*, 527 U.S. 1001 (1999). In *Haggar*, this Court held that the Federal Circuit had erred in declining to extend *Chevron* deference to tariff classification regulations promulgated by the Customs Service. 526 U.S. at 394. The Court remanded the case to the Federal Circuit to determine how 19 C.F.R. § 10.16 fared under the *Chevron* framework. 526 U.S. at 395. In doing so, the Court noted that the Federal Circuit would confront a "difficult question," given the "substantial arguments" Haggar had raised regarding both the validity of the regulation in light of the statute's plain language, and the arbitrariness of the regulation's application to the permapressing operations at issue in that case. *Id.* at

394-95. In addition, the Court stated that, because Congress had provided specific examples of operations that were to be deemed incidental to assembly, "the agency's rules as to instances not covered by the statute should be parallel, to the extent possible, with the specific cases Congress did address." *Id.* at 393.

6. On remand, the Federal Circuit treated this case and *Haggar* as companion cases, and decided both cases in separate opinions issued by the same panel on the same day. The decision below did not engage in any independent analysis of the regulation's reasonableness under *Chevron*. Instead, the court simply "incorporate[d] by reference the entirety of section II" of its opinion in *Haggar*, where the Federal Circuit held that Customs' approach of identifying categories of processes that are not incidental to assembly, see 19 C.F.R. § 10.16(c), is not inconsistent with the statute. App. 5a. The court nowhere addressed whether the specific category at issue here, subsection 10.16(c)(4), which covers "bleaching of textiles," could be rationally reconciled with the statute.

The court below also concluded that the Customs Service had properly applied the regulation in this case. Noting that subsection 10.16(c)(4) refers to "[c]hemical treatment" and "bleaching of textiles" as operations that are not incidental to assembly, the court held that "the enzyme-wash lightens the color and softens the denim fabric via chemical activity, which falls well within the reasonable scope of the phrase 'bleaching of textiles,' not to mention the phrase 'chemical treatment.'" App. 5a. Again, the court did not consider whether this category, even if valid, was arbitrarily applied to the "bleaching" process at issue here.

REASONS FOR GRANTING THE PETITION

This case presents the same question raised in the companion case from the Federal Circuit, *Haggar Apparel*

Company v. *United States* (petition for cert. filed January 17, 2001): whether 19 C.F.R. § 10.16(c) represents a reasonable interpretation of the phrase "operations incidental to the assembly process" under Subheading 9802.00.80. In the petition for certiorari in *Haggar*, Haggar has argued that the Federal Circuit erred by failing to engage in *any* arbitrariness review of 19 C.F.R. § 10.16(c), in conflict not only with decisions of this Court, but also with the approach followed by a majority of the circuits. Levi incorporates those arguments here. Cf. Sup. Ct. R. 12.4 (parties seeking review of two judgments from same court involving identical or closely related issue may do so in single petition).

The Federal Circuit's *Chevron* analysis was as deficient in this case as it was in *Haggar*. Here, as in *Haggar*, the court of appeals abdicated its duty to examine both the rationality of the classification scheme itself, and the rationality of its application in this case. Had it performed either inquiry, it could not have affirmed Customs' classification ruling.

First, the court of appeals entirely skipped over the basic issue of administrative review presented in this case, which is whether subsection 10.16(c)(4)'s reference to "bleaching of textiles" is consistent with the statute. Even a cursory examination of the issue would have revealed that it is not. Subheading 9802.00.80 specifically lists "painting" as an operation considered incidental to assembly. This example indicates that Congress did not view the application of chemicals to change the color of an article as significant enough to warrant excluding the article from eligibility for the partial duty exemption. The "bleaching of textiles" is not meaningfully different from painting: It is simply the application of chemicals to change the color of fabric. (The same could also be said of the "dying" of textiles, another process that the regulation erroneously categorizes as non-incidental.)

There is no valid reason for the court of appeals' failure to address this basic inconsistency between the statute and the

regulations. Indeed, this Court specifically directed such an inquiry in *Haggar*, when it stated that "the agency's rules as to instances not covered by the statute should be parallel, to the extent possible, with the specific cases Congress did address." 526 U.S. at 393. What is more, the Court of International Trade effectively pointed out this very issue, when it found, in explaining its decision, that "the enzyme-wash is analogous to . . . painting." App. 19a. The court of appeals never explained its basis for rejecting the lower court's finding.

This case thus vividly illustrates the fundamental flaw in the Federal Circuit's application of *Chevron* and *Haggar*. Having concluded that the agency was within its rights to adopt a category-based classification scheme, the court simply abandoned any further analysis. It therefore failed to address petitioner's substantial challenge to the consistency of the particular category at issue here with the statute. This failure to engage in the mode of analysis directed by this Court is itself grounds for plenary review.

Second, the court of appeals also failed to assess whether the regulation as applied here rationally distinguishes between operations categorized as incidental to assembly and those categorized as non-incidental. For example, the regulation treats "cleaning" as a process incidental to assembly. 19 C.F.R. § 10.16(b)(1). Under this subsection, Customs has determined that "washing" of garments is a process incidental to assembly – even if enzymes are added to the wash – so long as the garments experience only "mild" fading in color as a result. See, *e.g.*, Headquarters Ruling Letter No. 560744, 1998 WL 731118 (Customs Apr. 28, 1998); Headquarters Ruling Letter No. 559702, 1996 WL 612405 (Customs July 12, 1996). However, where Customs views the fading caused by a particular enzyme wash to be more than mild, as it did in this case, the agency deems the process equivalent to the "bleaching of textiles" under subsection 10.16(c)(4). This distinction between "washing" and "bleaching" operations,

which turns on subjective judgments about the degree of fading caused, is wholly arbitrary and irrational. As the Court of International Trade noted, the enzyme-washing process "simply removes a measure of the indigo dye . . . that would naturally come from washing and wearing the denim jeans." App. 19a. Yet the decision below upheld the regulation without any analysis of whether there was a reasoned explanation for the distinction Customs has drawn.

Moreover, as was the case in *Haggar*, the court of appeals failed to examine the rationality of a regulatory scheme in which more costly operations are deemed incidental to assembly, while less expensive operations are not. Here, the court of appeals itself noted in its initial ruling that the indigo dye on denim jeans "is readily removed through washing as well as normal wear and tear." App. 22a. Thus, Levi undoubtedly could have achieved the softening and fading effects it desired simply by subjecting the jeans to repeated cycles of normal washing. Rather than engage in that laborious process, Levi added an enzyme to the wash to achieve the same results in a more economical fashion. The court below never analyzed how Customs' decision to classify the labor-intensive process of washing as incidental to assembly, while categorizing the more efficient enzyme-washing process as non-incidental, could possibly constitute a rational interpretation of the statute.

* * * *

The issue raised here is of exceptional importance to the administration of the Nation's tariff laws. The Federal Circuit exercises exclusive jurisdiction over appeals as of right in customs classifications disputes, see 28 U.S.C. § 1295(a)(5), and thus as a practical matter is the only appellate forum in which challenges to the validity of classification regulations may be brought. As both this case and *Haggar* demonstrate, however, the Federal Circuit has abdicated all review of the arbitrariness of those regulations, and has left the Customs Service with essentially unfettered discretion to interpret the

governing tariff statutes as it pleases. Only this Court can require the Federal Circuit to provide the review that the law mandates.

This Court should grant the petition both in *Haggar* and in this case, and consolidate the two cases for briefing and argument. This will allow the Court to review not only the Federal Circuit's failure to analyze the application of the regulation to particular goods (as in *Haggar*), but also to address the Federal Circuit's failure to analyze a particular subcategory of the regulation (here, the "bleaching of textiles") that is itself inconsistent with the statute. Alternatively, and at the very least, if the Court decides to review *Haggar* alone, the Court should hold this petition pending the Court's decision in *Haggar*. If the Court were to reverse in *Haggar*, it could then grant this petition, vacate the Federal Circuit's judgment, and remand for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD W. GERDES
GILBERT LEE SANDLER
EDWARD M. JOFFE
SANDLER, TRAVIS
& ROSENBERG, P.A.
1300 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 638-2230

CARTER G. PHILLIPS*
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

MARK E. HADDAD
PAUL J. WATFORD
SIDLEY & AUSTIN
555 West Fifth Street
40th Floor
Los Angeles, CA 90013
(213) 896-6000

Counsel for Petitioner

January 17, 2001

* Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 97-1536.

LEVI STRAUSS & CO.,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

July 27, 2000

Rehearing and Rehearing En Banc Denied
Oct. 19, 2000

Before NEWMAN, MICHEL, and CLEVENGER, Circuit Judges.

CLEVENGER, Circuit Judge.

On remand from the United States Supreme Court, *see United States v. Levi Strauss & Co.*, 527 U.S. 1001, 119 S.Ct. 2335, 144 L.Ed.2d 233 (1999) (mem.), defendant United States seeks reversal of the United States Court of International Trade's determination that plaintiff Levi Strauss & Company's imported articles qualified for the partial exemption from import duties specified in Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States, codified at 19 U.S.C. § 1202 (1994). *See Levi Strauss & Co. v. United States*, 969 F.Supp. 75, 81-82 (1997). Because the imported goods are disqualified from the partial exemption by application of 19 C.F.R. § 10.16(c), we reverse the judgment of the Court of International Trade and remand

with instructions to enter judgment in favor of the United States.

I

Levi Strauss & Company ("Levi") designs, manufactures, and markets a wide range of apparel. The merchandise at issue in this appeal consists of boys' "stonewashed" jeans sold by Levi in the United States under its LEVI trademark.

Because some consumers prefer to purchase denim jeans that are slightly faded and softer than "new" denim, many manufacturers, including Levi, remove the oils and waxes used in the denim fabric weaving process that otherwise retard the fading of the original indigo color. In addition, the color is lightened by washing the jeans. The lightening and softening process can be accelerated by stonewashing, a technique that typically involves adding stones or similar particles to the wash to abrade the fabric. Certain manufacturers, including Levi in the instant case, achieve the same stonewashing effect by adding an enzyme to the wash.

The denim fabric for the merchandise at issue was cut to shape in Spartanburg, South Carolina, and then shipped, along with other components, such as buttons, threads, and zippers, to a company located in Guatemala. Prior to reentry into the United States, the jeans were assembled and stonewashed (actually, enzyme-washed).

Upon their import into the United States, the United States Customs Service ("Customs") determined that the enzyme-washing process took the jeans outside of the classification of Subheading 9802.00.80 of the Harmonized Tariff Schedule of the United States ("HTSUS"), which provides a partial exemption from otherwise-applicable duties. In relevant part, Subheading 9802.00.80, 19 U.S.C § 1202, is limited to:

> Articles . . . assembled abroad in whole or in part of fabricated components, the product of the United States, which . . . (c) have not been advanced in value or

> improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting. . . .

Customs has promulgated a regulation, 19 C.F.R. § 10.16(c), interpreting the "operations incidental to assembly process" language used in the HTSUS:

> (c) *Operations not incidental to the assembly process.* Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202):
>
> . . .
>
> (4) Chemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles. . . .

The regulation was adopted in 1975 by the Commissioner of Customs, after notice-and-comment rulemaking. *See* 39 Fed.Reg. 24651 (1974) (proposed regulation); 40 Fed.Reg. 43021 (1975) (final regulation).

Pursuant to section 10.16(c)(4), which denotes "chemical treatment" and "bleaching of textiles" as operations that fall outside of the exemption provided by HTSUS 9802.00.80, Customs denied the exemption to duty. Levi challenged the denial of its protest against such classification by filing this

suit in the Court of International Trade. *See* 19 U.S.C. § 1515 (1994) (establishing protest and review procedures for Customs classification decisions).

The Court of International Trade concluded, pursuant to the multi-factor test established by this court's predecessor in *United States v. Mast Indus., Inc.*, 69 C.C.P.A. 47, 668 F.2d 501 (1981), that the enzyme-washing operation was incidental to the assembly process and thus did not disqualify the pants from treatment under HTSUS 9802.00.80. *See Levi Strauss & Co. v. United States*, 969 F.Supp. 75, 81-82 (1997). The court did not consider the effect of 19 C.F.R. § 10.16(c).

Customs appealed to this court, which declined to consider the regulations under the framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), and affirmed the Court of International Trade. *See Levi Strauss & Co. v. United States*, 156 F.3d 1345, 1348, 1350-51 (1998). Customs then petitioned for a writ of certiorari to the Supreme Court, which was granted. *See* 527 U.S. 1001, 119 S.Ct. 2335, 144 L.Ed.2d 233 (1999). The Supreme Court vacated this court's judgment and remanded the case for further consideration in light of *United States v. Haggar Apparel Co.*, 526 U.S. 380, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999), which held that HTSUS 9802.00.80 was ambiguous, for purposes of *Chevron* analysis, thereby requiring courts to defer to Customs regulations manifesting a reasonable interpretation of that Subheading. *See id.* at 391-92, 119 S.Ct. 1392.

Upon remand, we ordered additional briefing and oral argument, *see Levi Strauss & Co. v. United States*, 217 F.3d 849, 1999 WL 798027 (1999) (order), and now hold that Customs correctly applied 19 C.F.R. § 10.16(c) to cover the imported enzyme-washed jeans, thereby precluding classification under HTSUS 9802.00.80.

II

In a companion case, *Haggar Apparel Co. v. United States*, issued today, we hold that 19 C.F.R. § 10.16(c) is a reasonable interpretation of the "operations incidental to the assembly process" requirement of HTSUS 9802.00.80 and is thus entitled to deference pursuant to *Chevron*. *See* No. 97-1002, slip op. at 12 (Fed.Cir. July 27, 2000). Because the identical issue is raised in this case, we hereby incorporate by reference the entirety of section II of the *Haggar Apparel* opinion. This holding disposes of Levi's primary argument against Customs' use of 19 C.F.R. § 10.16(c) in determining whether the imported jeans in this case could be classified according to HTSUS 9802.00.80. *See id.*, slip op. at 8-11 (rejecting argument that § 10.16(c) is contrary to the expressed intent of Congress).

This case thus turns on the question of whether the enzyme-washing (or stonewashing) process falls within the categories of operations described in 19 C.F.R. § 10.16(c) as "*not* incidental to the assembly process" (emphasis added). Because neither party disputes any of the material facts involving the imported articles, this question reduces to an application of the language of 19 C.F.R. § 10.16(c).

We have little trouble concluding that Customs properly applied its regulation in this case. Section 10.16(c)(4) specifically lists "chemical treatment" and "bleaching of textiles" as categories of operations that are not "incidental to the assembly process." There is no dispute that the enzyme-wash lightens the color and softens the denim fabric via chemical activity, which falls well within the reasonable scope of the phrase "bleaching of textiles," not to mention the phrase "chemical treatment." We conclude that Customs did not err in applying section 10.16(c) to the enzyme-wash operation conducted on the imported jeans.

CONCLUSION

Because Customs' interpretation of HTSUS 9802.00.80, 19 U.S.C. § 1202, as found in 19 C.F.R. § 10.16(c), is reasonable, it is thus entitled to substantial judicial deference. *See Haggar Apparel*, No. 97-1002, slip op. at 11. Further, Customs' application of section 10.16(c)(4) to the stonewashing or enzyme-washing operation conducted on Levi's imported jeans in this case is not incorrect. We therefore conclude that Customs' determination that the articles do not qualify for the partial exemption from duty allowed by HTSUS 9802.00.80 must be sustained. The Court of International Trade's judgment to the contrary is accordingly reversed, and we remand the case with instructions to enter judgment in favor of the United States.

COSTS

No costs.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 97-79
Court No. 93-11-00726

LEVI STRAUSS & COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

June 19, 1997

OPINION

MUSGRAVE, Judge.

Plaintiff Levi Strauss & Company ("Levi") brings this action to contest the denial of a protest by the United States Customs Service ("Customs") that sought duty allowances for U.S. origin cotton denim fabric components that were shipped to Guatemala for assembly and reentered into the U.S. Levi requested that the subject merchandise be allowed partial duty allowances under subheading 9802.00.80 of the HTSUS arguing that the cotton denim components were not advanced in value or improved in condition other than by the actual assembly or by minor operations incidental to assembly. Customs denied the protest on the basis that the "enzyme-washing" process, commonly referred to as stonewashing, placed the subject merchandise out of the purview of subheading 9802.00.80 because the finishing operations were not minor or incidental to assembly. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) and finds that enzyme-washing in this case was incidental to

assembly and orders Customs to refund the amount of duty in question with interest.

Background

The subject merchandise is 100% cotton denim fabric components manufactured in the U.S. and then exported to Guatemala for assembly into boy's cotton denim jeans known as style "550" five-pocket denim jeans. The denim fabric is cut-to-shape by Precision Cutting, Inc. in Spartanburg, S.C. and along with other components of the finished product including buttons, thread, zippers and other trim items, is transported to a Guatemalan assembler/laundry known as Koramsa, S.A. Koramsa assembled the denim jeans from the material supplied entirely by Levi. Immediately after assembly, the denim jeans were enzyme-washed, dried, pressed, labeled, inspected, sorted and packed for shipment to the U.S.

Upon importation into the U.S. in 1993, the subject merchandise was classified by Customs as boy's 100 percent cotton woven trousers under HTSUS subheading 6203.42.40 with a duty rate of 17.7% *ad valorem*. Levi timely filed a protest claiming that the cost or value of the U.S. cut-to-shape denim fabric components should have been deducted from the duty assessment under subheading 9802.00.80 of the HTSUS. Customs denied the protest on the grounds that the enzyme-washing process employed by Levi was not a minor operation incidental to the assembly process as contemplated by subheading 9802.00.80. Levi timely filed a summons and complaint with the Court contesting Customs' protest denial.

Standard of Review

Under 28 U.S.C. § 2639(a)(1), Customs' decision is "presumed to be correct" and the "burden of proving otherwise shall rest upon the party challenging such

decision."[1] However, recent decisions from the Court of Appeals for Federal Circuit ("CAFC") have ruled that the presumption of correctness applies solely to factual questions and this Court's duty is to find the correct result.[2] The Court reviews the ultimate question in a classification case *de novo*. As the Court has found, classification decisions entail a three step process.

> The purely factual inquiry in every classification case involves determining what the subject merchandise is and what it does. The purely legal question involves determining the meaning and scope of the tariff provisions. The ultimate mixed question becomes whether the merchandise has been classified under an appropriate tariff provision, or equivalently, whether the merchandise fits within the tariff provision. This ultimate issue involves both a legal and factual component: indeed the ultimate issue is an inseparable

---

[1] 28 U.S.C. § 2639(a)(1) (1994).

[2] The duty of the Court to find the correct result in a classification case stems from both legislative and judicial sources. "[T]he trial court . . . must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative . . . . [T]he court's duty is to find the correct result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 2 Fed.Cir. (T) 70, 75, 733 F.2d 873, 878 (1984). "If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision." 28 U.S.C. § 2643(b). *See Goodman Mfg., L.P. v. United States*, 13 Fed.Cir. (T) —, —, 69 F.3d 505, 508 (1995) (the statutory presumption of correctness attaches only to an agency's factual determinations) *and Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (1997) (legal issues are not afforded deference under 28 U.S.C. § 2639 or under the administrative deference standard promulgated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

> hybrid of the discrete factual and legal inquiries and is therefore a mixed question of law and fact reviewable *de novo*.

Bausch & Lomb, Inc. v. United States, 21 CIT —, —, 957 F.Supp. 281, 284 (1997). The purely factual inquiry is subject to the "clearly erroneous" standard while the purely legal question and the ultimate mixed question of law and fact are reviewable *de novo*. *Id.* at 284.

Although this case comes before the Court for a review of Customs classification pursuant to 28 U.S.C. § 1581(a), the issue involved does not confront nor generate the typical classification considerations. Unlike most classification reviews, there is no contention between the parties as to competing tariff provisions: under subheading 9802.00.80 the subject merchandise either satisfies the statute or it does not. Therefore, the purely legal question found in most classification cases has already been answered. Further, the parties in the instant case have no argument as to the material facts at issue thereby precluding the need to answer the purely factual questions involved in a classification case. What remains is the ultimate mixed question of law and fact, or whether the facts satisfy or fit the statutory standard which the Court reviews *de novo* to determine the correct result.

Discussion

Levi contests Customs' denial of a protest seeking duty allowances under HTSUS subheading 9802.00.80 for the U.S. origin cut-to-shape denim fabric components shipped to Guatemala and reentered into the U.S. Customs denied the duty allowance based on the conclusion that the enzyme-wash performed in Guatemala advanced the value or improved the condition of the U.S. origin components in a significant manner thereby placing the subject merchandise outside the scope of subheading 9802.00.80. The statute together with its legislative history and relevant case law lead the Court to

find that the added value or improvement in condition provided by the enzyme-wash was minor and incidental to the assembly process qualifying the subject merchandise for duty allowance under subheading 9802.00.80.

Subheading 9802.00.80 provides that:

> Articles, except goods of heading 9802.00.90, assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.
>
> [With a general rate of duty of:]
>
> A duty upon the full value of the imported article, less the cost or value of such products of the United States. . . .

HTSUS subheading 9802.00.80 (1996). In order for goods to be allowed 9802.00.80 status, all three subparts must be satisfied. In the instant case, the parties are not contesting subparts (a) and (b) of subheading 9802.00.80. The parties and the Court agree that the first section of subpart (c) is not at issue since the enzyme-wash does advance the value of the denim fabric components as well as improve their condition. This leaves a single question of whether the enzyme-wash falls into the exception of subpart (c): is the enzyme-wash an operation incidental to the assembly process?

The legislative history of HTSUS subheading 9802.00.80 is illuminating. The predecessor of subheading 9802.00.80, item 807.00 of the TSUS was amended in 1965 and the House Report states:

> The amended item 807.00 would specifically permit the U.S. component to be advanced or improved "by operations incidental to the assembly process such as cleaning, lubricating, and painting." It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. . . . Such operations, if of a minor nature incidental to the assembly process, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad.

H.R.Rep. No. 88-1728, at 46 (1964). The predecessor to the CAFC, the U.S. Court of Customs and Patent Appeals, interpreted the language of the legislative history and forged a set of criteria to determine whether a process is incidental to assembly in *United States v. Mast Industries, Inc.*, 69 C.C.P.A. 47, 668 F.2d 501 (1981). The *Mast* court found that the "legislative intent was to not preclude operations that provide an 'independent utility' or that are not essential to the assembly process; rather, Congress intended a balancing of all relevant factors to ascertain whether an operation of a 'minor nature' is incidental to the assembly process." *Id.* at 53-54, 668 F.2d at 506. The *Mast* court then listed the relevant factors useful in ascertaining whether a process is incidental to assembly:

> (1) Whether the cost of the operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered "minor."
>
> 2) Whether the operations in question were necessary to the assembly process. . . .

(3) Whether the operations were so related to assembly that they were logically performed during assembly.

[(4) W]hether economic or other practical considerations dictate that the operations be performed concurrently with assembly.[3] *Id.* (citations omitted). The application of these so-called "*Mast* factors" facilitates the Court's resolution of whether the enzyme-wash employed by Levi is incidental to the assembly of the imported denim jeans.

I. Cost and Time Comparisons

The first *Mast* factor is composed of a cost element and a time element. In weighing these elements, courts have first been obliged to define the scope of the contested operation as well as the scope of the comparative assembly process. In a recent CAFC decision reviewing duty allowance for an intricate painting procedure, the court defined the scope of the contested operation to be comprised of the total of all of the painting steps in order that item 807.00 was not undermined "by allowing major and significant operations to be broken down to a point where each step could be called minor." *General Motors Corp. v. United States*, 16 Fed.Cir. (T) —, —, 976 F.2d 716, 720 (1992). Since the scope of the enzyme-wash procedure at issue here is well-defined, the danger lies in defining the scope of the comparative assembly process; limiting the scope of the comparative assembly process directly increases the importance of the operation which would allow potentially minor steps to be built up to major and significant operations.

The Court notes the subtle difference in the wording between the cost comparison and time comparison in *Mast*. The *Mast* court perspicaciously compared the "cost of the operation relative to the cost of the *affected component*"

---

[3] The fourth factor was not at issue in *Mast* but the court noted its potential relevance in other actions.

which properly measures the relative importance of the process at issue with the subject merchandise considered for the duty allowance.[4] The correct cost comparison is accordingly made between the cost of the enzyme-wash process and the cost of the denim fabric components, which is the subject of the duty allowance at issue here. Model cost comparisons measure the percentage of relative specific costs by simply dividing the cost of the process by the component cost which yields a percentage representing that specific costs' relative importance. Applying that methodology, the relative cost is computed by dividing the enzyme-wash cost of $.80 by the denim fabric cost of $2.96 resulting in a figure of 27%.

In *General Motors*, the CAFC also compared capital investment costs in its overall cost determination. *General Motors Corp. v. United States*, 16 Fed.Cir. (T) —, —, 976 F.2d 716, 721. Levi uses the same capital equipment for all of its washing operations. The Court finds that the capital investment cost, therefore, is minor. Taken together, the cost of the enzyme-wash relative to the denim fabric components and the capital investment cost are minor and incidental to the assembly process. The Court finds that the cost comparison weighs in favor of granting the duty allowance for the denim fabric components at issue.

Time comparisons provide concurring results. In contrast to the cost comparison, the time comparison promulgated from the *Mast* court gauged "the time required by the operation relative to the time required for assembly of the *whole article*." *United States v. Mast Industries, Inc.*, 69 C.C.P.A. 47, 54, 668 F.2d 501, 506 (1981) (emphasis added). Levi washes 296 pairs of denim jeans in a single wash which takes 99 minutes. Customs argues that the total enzyme-wash

---

[4] *United States v. Mast Industries, Inc.*, 69 C.C.P.A. 47, 54, 668 F.2d 501, 506 (1981) (emphasis added).

time of 99 minutes must be used for each garment assembled. The Court disagrees with that analysis since this would allow potentially minor steps to be built up to major and significant operations. The correct wash time per garment is determined by dividing the time of the wash by the number of garments washed. The result is that the enzyme-wash takes .334 minutes per garment. The per garment total assembly time is nineteen minutes. The relative time is calculated by dividing the per garment wash time by the per garment total assembly time which results in a 1.1% relative time. The Court finds that 1.1% represents a minor time interval and, together with the cost comparisons, is incidental to the assembly process.

II. Necessary to the Assembly Process

Although enzyme-washing is closely related to the assembly process, the process cannot be said to be necessary to the assembly process. In manufacturing other apparel, Levi sends fully assembled garments to separate enzyme-washing facilities. In fact prior to installation of the enzyme-wash machinery in Guatemala, Levi shipped the assembled denim jeans to U.S. finishing facilities where the enzyme-wash was conducted. The Court finds that the enzyme-wash procedure is not necessary to the assembly process and this factor weighs against granting the duty allowance under subheading 9802.00.80.

III. Logically Performed During Assembly

The third *Mast* factor assesses the need for the performance of the enzyme-washing operation during the assembly process. Customs argues that the enzyme-wash is "not at all directly related to the sewing operations which constitute assembly here." Def.'s Post Trial Br. at 29. This claim, however, ignores the true focus of this factor which is whether the operation in question is logically performed during the assembly process. The entire inquiry may be aptly

described as determining whether there is a direct relationship between the enzyme-wash and the whole assembly process performed overseas, but the Court finds that the aim of the third *Mast* factor is to ascertain whether the enzyme-wash is logically performed during the assembly process. Levi has asserted that the enzyme-wash is "more sensibly performed under the same roof at the assembly plant" which is "due to the nature of the process and the requirement that it be completed prior to the other finishing operations." Pl.'s Post Trial Br. at 9. The Court finds the enzyme-wash operation is logically performed at the situs of the assembly process where all other assembly and post-assembly steps are performed and where the trained personnel are located. Transferring the enzyme-wash process would entail the utilization of a separate set of production factors which the Court finds would favor the performance of the enzyme-wash at the plant in Guatemala. This *Mast* factor weighs in favor of providing duty allowance to the denim fabric under subheading 9802.00.80.

IV. Economic and Practical Considerations

Customs contends that this criterion has no bearing on the resolution of the issue before the Court. Customs states,

> both item 807.00(a) and (c) contemplate that there will be prohibitory non-assembly operations performed concurrently with assembly. Therefore, if this factor were utilized, as indicated by *Mast*, it would essentially eviscerate the clearly stated prohibited operations contemplated by item 807.00(a), and the prohibited advancements in value or improvements in condition performed before, during, or after assembly, which are implicit in item 807.00(c).

Def.'s Post Trial Br. at 29-30. Customs' interpretation of the fourth *Mast* factor is mistaken. The fourth *Mast* factor does not violate either subpart (a) or (c) of item 807.00; in fact, as

stated in this opinion and agreed to by the parties, the sole question at issue is outside of the purview of subpart (a) and the first element of subpart (c), which Customs calls into question here.

Levi states that there are numerous economic and practical reasons for conducting the enzyme-wash at the situs of the assembly plant in Guatemala. Levi argues that its ability to detect and correct sewing and laundry defects would be compromised since these defects are more easily discovered after washing the garment. Pl.'s Post Trial Br. at 9. Levi also contends that performing the enzyme-wash on site in Guatemala produces more first quality garments and reduces the time it takes to get the garments to the buyer. *Id.* at 9-10. Additional labor costs would also be incurred if the enzyme-wash process were performed in the U.S. as the garments would have to be unpacked and repackaged. *Id.* at 10. The Court finds that there are economic and practical advantages of performing the enzyme-washing operation at the site of final assembly. This factor weighs in favor of granting duty allowance under subheading 9802.00.80.

V. Protection of the U.S. Industry

Customs makes a broad policy argument concerning what Customs proclaims as Levi's embarkation on a course of moving operations overseas that will negatively impact on the U.S. domestic industry. Def.'s Post Trial Br. at 2. Customs states,

> It is a basic principle of Customs jurisprudence that tariff laws were intended to raise revenues and were enacted to "encourag[e] the industries of the United States.["][sic] While Levi may generally be considered a domestic company, when we are discussing the transfer of United States operations abroad the real domestic industry that is protected and must be "encouraged" by the limitations Congress placed upon the grant of duty

> free treatment in heading 9802 is the United States finishing industry that may be seriously injured by the transfer of finishing operations abroad, and the domestic industry that manufactures machinery and equipment in the United States that is clearly going to be injured by the transfer of finishing operations to Guatemala, which purchases archaic equipment from Korea due to Guatemala's low labor costs.

Def.'s Post Trial Br. at n. 1 (citation omitted). The Court notes that this argument is misplaced. The parties have not submitted and the Court is not aware of any evidence to substantiate the claim that the legislative intent behind subheading 9802.00.80 and its predecessor item 807.00 was to protect the domestic industry from U.S. companies' moving operations offshore. The only discussions of the intent behind the enaction of item 807.00 was to allow U.S. produced goods to compete with foreign made goods, which is exactly what Levi has done here.[5]

The argument that Customs forwards cuts both ways. By denying the duty allowance, there is a further benefit to the U.S. company to relocate their entire operation offshore. Recognizing this danger Chief Judge Nies warned that "[b]ecause of the denial of the deduction for these United States components, another part of the fabrication of automobiles in the United States will likely be lost. This cannot be the intent of Congress." *General Motors Corp. v. United States*, 16 Fed.Cir. (T) —, —, 976 F.2d 716, 723 (1992). What is to prevent Levi from moving the fabric manufacturing and cutting operations offshore when the denial of duty allowance increases domestic costs beyond the costs incurred overseas? The Court is reluctant to wade into

---

[5] *See Free List, Special and Administrative Provisions: Hearings on the Tariff Act of 1929 Before the Committee on Finance*, 71st Cong. Vol. 6, 125-134 (1929).

these turbulent policy waters particularly when neither the statute nor its legislative history compel the Court.

VI. Other Considerations

Finally, the Court finds that the enzyme-wash is analogous to cleaning and painting which the statute specifically lists as being minor and incidental to the assembly processes. The enzyme-wash does not add anything to the denim fabric, it simply removes a measure of the indigo dye and gives the denim fabric a certain amount of abrasion that would naturally come from washing and wearing the denim jeans. Further, the enzyme-wash does not change the composition or structure of the denim fabric. Similarly, in *Haggar Apparel Co. v. United States,* 20 CIT —, 938 F.Supp. 868 (1996), the Court found that the curing operation which imparted crease retention and seam and surface flatness to men's pants was minor and incidental to the assembly process. The enzyme-wash is directly comparable to the curing operation in *Haggar* and the Court finds that the same reasoning and conclusion are applicable to the instant case.

Taken as a whole, the *Mast* factors as applied to the instant case and all other considerations weigh in favor of granting the duty allowances. Both cost and time comparisons are evidence that the enzyme-wash is incidental to the assembly process involved in producing the denim jeans in question. The enzyme-wash procedure is not necessary to the assembly process but it is logically, economically and practically performed in conjunction with the assembly process. Therefore, the balancing of all of the relevant factors before the Court weighs in favor of granting the duty allowance under subheading 9802.00.80 for the U.S. produced denim fabric.

Conclusion

For the foregoing reasons, the Court finds that the denim fabric is correctly classified under HTSUS subheading 9802.00.80.

JUDGMENT

Upon conducting trial, reading plaintiff's pretrial and post trial briefs, defendant's pretrial and post trial briefs, and upon consideration of all other papers and proceedings had herein, it is hereby

ORDERED that the defendant reliquidate the subject entries with a duty allowance for the value of the U.S. origin fabric components under HTSUS subheading 9802.00.80; and it is further

ORDERED that defendant refund the duties paid on the U.S. origin fabric together with the attributable costs such as cutting and inland transportation with interest.

APPENDIX C

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 97-1536

LEVI STRAUSS & COMPANY,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

Sept. 22, 1998

Rehearing Denied Nov. 24, 1998

Before NEWMAN, Circuit Judge, SKELTON, Senior Circuit Judge, and MICHEL, Circuit Judge.

MICHEL, Circuit Judge.

The United States appeals from the judgment of the United States Court of International Trade reversing the denial by the United States Customs Service ("Customs") of Levi Strauss & Company's ("Levi's") protest that Levi was improperly denied a deduction from its duty assessment for the cost of certain fabric components manufactured in the United States. *See Levi Strauss & Co. v. United States*, 969 F.Supp. 75 (Ct. Int'l Trade 1997). This case was submitted for our decision following oral argument on August 5, 1998. Because, in accordance with our case law, the Court of International Trade properly reviewed Customs's interpretation of the pertinent classification regulations without deference and because the Court of International Trade's determination that the non-assembly operations performed outside of the United

States were incidental to the assembly process was not clearly erroneous, we affirm.

BACKGROUND

The merchandise at issue in this appeal consists of boys' "stonewashed" jeans sold by Levi in the United States under the Levi trademark. The jeans are assembled in Guatemala from denim fabric components and other incidental components, all of which are manufactured in the United States.

Denim fabric is composed of two types of cotton yarn woven in a crisscross pattern. One type, the weft yarn, is undyed, while the other type, the warp yarn, is dyed in indigo. However, because indigo has only a weak affinity for cotton, the indigo dye is merely painted on the warp yarn and is readily removed through washing as well as normal wear and tear. Thus, as a result of one half of the yarn being undyed and the other half having readily removable dye, the jeans fade in color fairly rapidly. As the parties here agree, this faded appearance is considered desirable to consumers. Accordingly, manufacturers, including Levi, remove the oils and waxes used in the weaving process that otherwise slow down the fading. In addition, manufacturers lighten the color by washing the jeans. These processes also soften the jeans, which it is agreed is also desirable to consumers. Some manufacturers also accelerate the washing process by stonewashing. This is where stones, or other such particles, are added to the wash to produce abrasion and thereby accelerate the wear and tear. Certain manufacturers, including Levi in the instant case, achieve the same stonewashing effect by adding an enzyme having the brand name "Cellulase" or "Denimax" to the wash.

The denim fabric for the merchandise at issue is cut to shape in Spartanburg, South Carolina, and then shipped, along with other components, such as buttons, threads, and zippers, to Koramsa, S.A., a company located in Guatemala. Prior to May 1993, Koramsa assembled the jeans and then

returned them to the United States where Levi then applied the stonewashing process. After May 1993, Koramsa also provided stonewashing in Guatemala.

Upon importation into the United States, the subject merchandise was classified by Customs as boys' one hundred percent cotton woven trousers under subheading 6203.42.40 of the Harmonized Tariff Schedule of the United States ("HTSUS"). This classification carried a duty of 17.7%. Levi filed a timely protest asserting that the cost or value of the denim fabric components manufactured in the United States should have been deducted from the duty assessment pursuant to HTSUS subheading 9802.00.80. Subheading 9802.00.80 provides a partial duty exemption for:

> [a]rticles, except goods of heading 9802.00.90, assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) *have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.*

(emphasis added). Customs denied Levi's protest on the grounds that the stonewashing process undertaken in Guatemala was not an operation "incidental to the assembly process" as contemplated by subheading 9802.00.80.

Levi appealed the decision to the Court of International Trade, which held that Customs incorrectly denied Levi a partial duty exemption for its denim fabric components. The Court of International Trade initially noted that subheading 9802.00.80 originated from item 870.00 of the former Tariff Schedule of the United States. Item 870.00 was amended in

1965 to the currently applicable language and the accompanying House Report stated:

> The amended item 807.00 would specifically permit the U.S. component to be advanced or improved "by operations incidental to the assembly process such as cleaning, lubricating, and painting." It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. . . . Such operations, if only of a minor nature incidental to the assembly process, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad.

H.R.Rep. No. 88-1728, at 46 (1964). The Court of International Trade explained that in *United States v. Mast Industries, Inc.*, 69 C.C.P.A. 47, 668 F.2d 501 (C.C.P.A. 1981), the United States Court of Customs and Patent Appeals, this court's predecessor court, interpreted this provision and its legislative history to provide a set of factors to be used in ascertaining whether a process is incidental to assembly. These so-called *Mast* factors are:

> (1) Whether the cost of the operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered "minor." . . .
>
> (2) Whether the operations in question were necessary to the assembly process. . . .
>
> (3) Whether the operations were so related to assembly that they were logically performed during assembly. . . .

> (4) [W]hether economic or other practical considerations dictate that the operations be performed concurrently with assembly.

Id. at 506 & n. 7.

The Court of International Trade then analyzed Levi's claimed exemption in accordance with these factors. It initially determined that, under the first factor, the relative cost of 27% of total component cost and relative time of 1.1% of total assembly time indicated that the stonewashing process was incidental to the assembly process. *See Levi*, 969 F.Supp. at 79-80 However, the court concluded that the second factor weighed against granting the partial duty exemption because the stonewashing process was not necessary to the assembly process, but rather could have been conducted at other facilities, as was the case prior to May 1993. *See id.* at 79-80. The court reasoned that the third factor weighed in favor of granting the partial duty exemption because it would be logical to perform the stonewashing "at the situs of the assembly process where all other assembly and post-assembly steps are performed and where the trained personnel are located." *Id.* at 80. With regard to the fourth factor, the court determined that economic and practical considerations weighed in favor of granting the partial duty exemption, including Levi being able to detect and correct sewing and laundry defects more easily after assembly, producing more "first-quality" garments, reducing the time to get the garments to the buyer, and saving on labor costs because there would be no need to unpack and repackage the garments. *See id.* at 80. Examining additional arguments, the court then rejected Customs's contention that permitting Levi this exemption would harm United States domestic industry. The court explained that it could find no support for the claim that the legislative intent of subheading 9802.00.80 was to protect domestic industry from domestic companies moving abroad, but rather found that it was enacted to allow,

as here, domestically manufactured goods to compete with foreign-made goods. *See id.* at 80-81. Finally, the court found that the stonewashing process was analogous to cleaning and painting, which subheading 9802.00.80 specifically lists as minor, and comparable to "the curing operation which imparted crease retention and seam and surface flatness to men's pants" that was found minor and incidental in *Haggar Apparel Co. v. United States*, 938 F.Supp. 868 (Ct. Int'l Trade 1996), *aff'd*, 127 F.3d 1460 (Fed.Cir.1997), *petition for cert. filed*, 67 U.S.L.W. 3001 (June 18, 1998). *Levi*, 969 F.Supp. at 81. Thus, the court concluded that the *Mast* factors, as well as other considerations, weighed in favor of granting Levi the partial duty exemption.

ANALYSIS

I.

The government's initial and seemingly primary argument on appeal is that the Court of International Trade erred by failing to accord deference to the interpretation by Customs of the applicable HTSUS provisions pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In support of this argument the government points to the authority granted to Customs by 19 U.S.C. § 1500(b) (1994) to "fix the classification and rate of duty applicable to such merchandise." Moreover, it further points to Customs's promulgation, under these and other authorities, of 19 C.F.R. § 10.16(c)(4) (1998), which provides, in relevant part, that "[t]he following are examples of operations not considered incidental to the assembly as provided under subheading 9802.00.00[:] . . . (4) Chemical treatment of components or assembled articles to impart new characteristics, such as . . . dying or bleaching of textiles."

We are somewhat perplexed as to why the government has chosen to appeal this issue because we are bound by precedent squarely rejecting the government's assertion of deference to Customs's regulatory interpretations of tariff classifications.[1] *See Haggar*, 127 F.3d at 1462 ("[T]he [Court of International Trade] properly rejected the United States' argument that Customs' regulations interpreting and applying this statute are entitled to deference under *Chevron*."); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed.Cir.1997) ("[N]o *Chevron* deference applies to classification decisions by Customs."); *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491 (Fed.Cir.1997) ("[N]either this court nor the Court of International Trade defers to Customs' interpretation of a tariff heading on the basis of special deference pursuant to *Chevron*."). As we have explained, "the Court of International Trade's statutory mandate to find the correct result is logically incompatible with *Chevron* deference." *Rollerblade*, 112 F.3d at 484. *See generally* 28 U.S.C. § 2643(b) (1994) (charging the Court of International Trade with the duty "to reach the correct decision"). Thus, in accordance with our prior precedent, we reiterate that no *Chevron* deference is due to Customs's interpretations of the tariff statutes and we therefore hold that the Court of International Trade's review of Customs's determinations complied with that court's statutory mandate.

II.

The government's second argument on appeal is that the Court of International Trade misapplied the *Mast* factors and that the stonewashing here was not minor and incidental to

---

[1] The government noted in its brief that, at the time of filing, it was considering whether to seek *in banc* review of *Haggar* or file a petition for a writ of certiorari and, therefore, "[i]n order to preserve our deference arguments, they must also be set forth in this case." Br. for Def.-App. at 25 n. 16. We fail to comprehend how the government's arguments were in any sense "preserved" by making them here.

the assembly process. We find no error of law in the court's application of the *Mast* factors and we conclude that the court's determination that the stonewashing was incidental to the assembly operation was not clearly erroneous. *See Universal Elecs.*, 112 F.3d at 493 ("[o]n appeal we review the Court of International Trade's factual findings—not those of Customs unless they coincide—for clear error. On questions of law, we defer to neither Customs' nor the Court of International Trade's interpretations; we decide such questions afresh." (Citation omitted)).

(i) The relative cost and time comparisons

The government contends that the Court of International Trade's cost comparison was inconsistent with *General Motors Corp. v. United States*, 976 F.2d 716, 11 Fed. Cir. (T) 1 (Fed.Cir.1992) ("*GM*"). In *GM* we reversed the Court of International Trade's grant of a partial duty exemption on various sheet metal components to a U.S. automobile manufacturer. After being assembled into vehicles abroad, the vehicle bodies were subject to a finish painting process. *See id.* at 718, 11 Fed. Cir. (T) at 1-2. Central to our reversal was the Court of International Trade's failure to include in its cost analysis all paint shop operations, which included, not just topcoat painting, but also zinc phosphate spraying, submerging in an electro deposition primer tank, baking, sanding, sealant treating, applying surface primer, curing, and waxing. *See id.* at 718-20, 11 Fed. Cir. (T) at 2-5. There was no such error in the Court of International Trade's analysis here. With regard to operating costs, the Court of International Trade expressly took note of *GM* and in calculating the "wash cost" took account of all components that were stonewashed. It was not error for the court to exclude certain post-wash costs, such as packing and shipping, from its "wash cost" calculation because these costs, unlike the included costs in *GM*, were entirely separate from the stonewash operation.

We similarly conclude that there was no clear error in the Court of International Trade's comparison of capital costs. Subheading 9802.00.80 lists "washing" as an incidental operation. Thus, capital investment in washing machines would not appear to be outside of the subheading's ambit. In addition, unlike *GM*, the Court of International Trade appears to have taken proper account of depreciation costs.

With regard to the time comparison, the Court of International Trade found that the stonewashing process accounted for 1.1% of the total time, based upon a single pair of denim jeans taking nineteen minutes to assemble and 296 pairs of jeans taking ninety-nine minutes to wash. Although the government argues that the Court of International Trade failed to take labor time into account, we are not persuaded that the time spent loading and unloading the jeans from the washing machines was anything other than *de minimis* and thus would not impact the calculation in a significant manner. We are also unpersuaded by the government's argument that the Court of International Trade should not have divided the ninety-nine minute washing time by the 296 jeans, but rather should have regarded the washing time as ninety-nine minutes per pair. This argument ignores the reality that all 296 pairs of jeans were washed together and, indeed, had to be washed together if the abrasive process was to be successful. Thus, the Court of International Trade's time comparison was not clearly erroneous.

(ii) The logic of performing the operations during assembly

The government argues that the stonewashing was not logically performed during the assembly process because it involved a different process (washing, rather than sewing) and different machinery (washing machines, rather than sewing machines). However, the government's argument appears to misconstrue this *Mast* factor. The appropriate inquiry is not whether the operation is somehow identical or

nearly identical to assembly itself, but rather whether the relationship between the operation and assembly is such that force of logic suggests that the operation be performed as an incident to assembly. Here, there was substantial evidence that the relationship between the stonewashing and the assembly of the jeans logically dictated that they be performed together. Thus, for example, certain paper tags and brand labels cannot be attached to the jeans prior to the stonewash because they would be mutilated by the stonewashing process. Accordingly, stonewashing the jeans at the point of assembly obviates the need to have a separate assembly staff elsewhere to attach these tags and labels. Moreover, it further obviates the need to pack the jeans for shipping only to have to unpack them elsewhere for stonewashing and attachment of tags and labels. Therefore, we conclude that the Court of International Trade's determination that this *Mast* factor weighed in Levi's favor was not clearly erroneous.

(iii) Economic and other considerations

As a threshold matter, we disagree with the government's contention that this fourth *Mast* factor "eviscerates" the purpose of subheading 9802.00.80 due to this factor supposedly permitting improper advancements in value. Advancements in value of the assembled merchandise are, of course, only permissible to the extent that they comply with the terms of subheading 9802.00.80. However, the question posed by this factor, whether there are economic or other practical justifications for performing the assembly operation abroad, is an entirely different question to whether the merchandise at issue has been subject to an improper advancement in value. Indeed, while the latter inquiry simply focuses on the value of the particular merchandise, the former looks more broadly to matters such as economic efficiency and general business strategy. Thus, we do not agree that this factor in any sense "eviscerates" the purpose of the

subheading. In any event, *Mast* is binding precedent and we cannot revise it, except *in banc*.[2] *See South Corp. v. United States*, 690 F.2d 1368, 1370 n. 2, 215 USPQ 657, 658 n. 2 (Fed.Cir.1982) (*in banc*).

The Court of International Trade's determination that economic and other considerations weigh in favor of granting the partial duty exemption was not clearly erroneous. Indeed, evidence was presented that certain imperfections are only apparent after the stonewashing and that it is, therefore, convenient to have the repair department of the assembly plant on site to make these corrections. Moreover, if the jeans are stonewashed elsewhere, it is apparently more difficult to identify the party to be made financially responsible for any damaged jeans. There was also evidence presented that shipping the jeans back to the United States for stonewashing can cause delays of several weeks and cause additional labor costs because the jeans have to be unpacked in the United States and then, after the stonewash, repacked, inspected, and tagged for the market in the United States. Finally, we find no merit in the government's argument that the stonewashing process cannot be considered minor because senior Levi corporate officers are involved in selecting the colors and shades desired from the stonewash. Plainly, senior management will invariably be involved in broad decision-making regarding production facilities and the product line. Not surprisingly, there is no authority or precedent for the proposition that this somehow disqualifies an importation from the partial duty exemption.

Consequently, because the Court of International Trade's determinations regarding the three disputed *Mast* factors were not clearly erroneous, we do not disturb the court's overall

---

[2] Of course, "we do not read *Mast* as announcing factors that must invariably be used to the exclusion of all others, or that all such factors are pertinent in every case involving [subheading 9802.00.80]." *GM*, 976 F.2d at 719-20, 11 Fed. Cir. (T) at 4.

weighing of the factors to determine that the stonewashing process was minor and incidental to assembly.

CONCLUSION

Because the Court of International Trade's non-deferential review of Customs's interpretation and determination complied with that court's statutory mandate and applied the correct law, and because the court's determination that the stonewashing process was minor and incidental to assembly was not clearly erroneous, we

AFFIRM.

APPENDIX D

[Filed Oct. 19, 2000]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-1536

LEVI STRAUSS & COMPANY,
Plaintiff-Appellee,

v.

UNITED STATES,
Defendant-Appellant.

ORDER

A combined petition for panel rehearing and rehearing en banc having been filed by the APPELLEE, and a response thereto having been invited by court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 26, 2000.

For the Court

/s/ Jan Horbaly (A.V.V.)
JAN HORBALY
Clerk

Dated: October 19, 2000